No. 77-1366

In the Supreme Court of the United States

OCTOBER TERM, 1977

GILES LOWERY STOCKYARDS, INC. D/B/A
LUFKIN LIVESTOCK EXCHANGE, PETITIONER

v.

DEPARTMENT OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, the operator of a market agency in Lufkin, Texas, that sells livestock at auction for a commission (Pet. App. A6), seeks review of a decision by the Department of Agriculture (Pet. App. A15-A99) that new commission rates petitioner sought to institute were not "just, reasonable, and nondiscriminatory," as required by 7 U.S.C. 206. The Department approved an alternative rate sched-

ule that was greater than petitioner's existing charges but less than the requested increase (see Pet. App. A17, A95-A99).[1] The court of appeals affirmed, holding that the Department's ratemaking schedule assured petitioner a reasonable rate of return, that petitioner had received proper notice of the method the Department proposed to use in determining the reasonableness of petitioner's proposed rates, and that the Department's decision is supported by substantial evidence (565 F.2d 321; Pet. App. A1-A14).

1. Petitioner contends that the Department failed to publish and give adequate notice of the methods it used to calculate the rates petitioner would be permitted to charge (Pet. 9-20). This contention is apparently grounded on both the Administrative Procedure Act, 5 U.S.C. 553 (see Pet. 19-20), and the Freedom of Information Act (FOIA), 5 U.S.C. 552 (a)(1)(D) (see Pet. 12): petitioner maintains that the Department should have established its standards for calculating reasonable rates in a rulemaking procedure rather than in an adjudicatory proceeding. As the court of appeals observed (Pet. App. A10-A11), however, an agency may announce new principles in an adjudicatory proceeding, and the choice between rulemaking and adjudication is a matter of agency discretion. *National Labor Relations Board*

[1] 7 U.S.C. 211 provides that whenever, after full hearing, the Secretary of Agriculture determines that any rates or charges are unjust, unreasonable, or discriminatory, the Secretary may determine and prescribe a just and reasonable rate or charge.

v. *Bell Aerospace Co.*, 416 U.S. 267, 290-294; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194.

Petitioner seeks to distinguish these cases on the ground that the Department had adopted and applied the ratemaking principles approved in the instant case as early as 1970 (Pet. 12-16). Thus, petitioner asserts, the principles were not adopted in either rulemaking or adjudication. But although a number of the theories that the Department formally adopted (for the first time) in this case had been applied on an informal case-by-case basis in previous years, that does not make their formal adoption less appropriate or valid. The principles were carefully considered and developed. They escaped authoritative announcement only because, until the present case, none had been challenged in a contested action. Indeed, because the only reported administrative proceedings involving auction stockyard rates were more than 30 years old, predating major changes in ratemaking theories, and the statutory provision requiring rates to be "just, reasonable, and nondiscriminatory" (7 U.S.C. 206) had never been judicially interpreted in an auction stockyard case, the Department's judicial officer[2] accurately concluded that this was "a case of first impression which will serve as a guide for the Department's rate policy involving about 2,000 auc-

[2] The judicial officer has been delegated the Secretary's final administrative authority to decide ratemaking cases under the Packers and Stockyards Act. 7 C.F.R. 2.35(a).

tion stockyards" (Pet. App. A38-A39).[3] Petitioner has not demonstrated that the Department's adoption of these ratemaking principles in this adjudicatory proceeding was an abuse of its discretion.

It must follow that the Department was not obliged to publish its ratemaking procedures prior to the decision of the judicial officer, and that the procedures used here did not violate the FOIA. Procedures cannot be published before they have been adopted; when procedures are adopted in adjudication, the agency's opinion always will be the first formal publication. In any event, as the court of appeals observed, petitioner had ample actual notice of the method the Department proposed to use in this case (Pet. App. A11):

> The Department informed petitioner's counsel by letter, well in advance of the hearing, of the "method used by the Packers and Stockyards Administration to analyze auction rates." Enclosed with the letter was a 15-page document outlining that method, as well as a financial analysis of Lufkin Livestock for rate purposes. See Exhibit 1, Record (vol. 1); Exhibit 10, Record (vol. 4). Petitioner was thus aware of the ratemaking approach, was aware that the De-

[3] Thus, in the next ratemaking case, the Secretary observed that the *Giles Lowery* decision "sets forth the Department's policy, which is binding on the Department's Administrative Law Judges." *In re Central Arkansas Auction Sale, Inc.*, 36 Agr. Dec. 764, 812 (decided May 6, 1977), affirmed *sub nom. Central Arkansas Auction Sale, Inc.* v. *Bergland*, 570 F. 2d 724 (C.A. 8), petition for a writ of certiorari pending, No. 77-1364.

> partment planned to apply it in this case, and was presented with opportunity to build a case around the method or attack its application.

Because petitioner had actual notice of the Department's proposed procedures, he cannot complain of the fact that they were not published in advance.[4]

2. To the extent that the petition challenges the rates established by the Department, it is answered by the court of appeals (Pet. App. A9):

> A party attacking a prescribed rate schedule must show with clear and convincing proof that the rates are unreasonably low. In the absence of such proof, the courts will not find a fifth amendment violation. *American Toll Bridge Co.* v. *Railroad Comm'n*, 307 U.S. 486, 494-95, 59 S.Ct. 948, 83 L.Ed. 1414 (1939); *FPC* v. *Hope Natural Gas Co., supra*, 320 U.S. at 602, 64 S.Ct. 281. Petitioner has failed to carry this rather heavy burden.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

[4] Actual notice is as effective as published notice to ensure that affected persons are apprised of agency rules. 5 U.S.C. 552(a)(1) provides:

> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

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